

ORIGINAL

FILED

January 26 2010

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CLERK OF THE SUPREME COURT  
STATE OF MONTANA

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**JUDICIAL STANDARDS COMMISSION  
STATE OF MONTANA**

INQUIRY CONCERNING COMPLAINT OF:	)	
	)	No. PRO9- <u>0639</u>
JUDICIAL STANDARDS COMMISSION,	)	
Complainant,	)	<b>RESPONDENT'S</b>
	)	<b>SUPPLEMENTAL</b>
	)	<b>MEMORANDUM IN</b>
vs.	)	<b>SUPPORT OF MOTION</b>
	)	<b>TO DISMISS</b>
	)	
LEROY NOT AFRAID,	)	
Respondent.	)	
	)	

**I INTRODUCTION**

The Prosecutor has lodged a Formal Complaint with this Commission alleging violations of the Montana Constitution and the Montana Code of Judicial Conduct claiming that Respondent should be disciplined by the Judicial Standards Commission. This action seeks extrajudicial imposition and enforcement of the Montana laws upon Respondent. This disciplinary action is illegal, and therefore Respondent's Motion to Dismiss should be granted with prejudice.

## II POINTS AND AUTHORITIES

### **A. STATE ILLEGALLY EXERCISES EXTRAJUDICIAL JURISDICTION IN ATTEMPTING TO ENFORCE STATE STATUTE ON TRIBAL ELECTIVE PUBLIC OFFICE**

Federal and Crow sovereignty prohibit the laws of the State of Montana from being enforced in the manner that the Prosecutor seeks to in the Formal Complaint. This position is historically and legally supported by the fact that there are in existence three separate sovereigns (federal, state and tribal), three Constitutions, three legislative systems, three judiciaries, three body of laws, three distinct electorates (publics) and three separate political systems.

The test for determining the validity of state action in relation to Indian tribes is “whether [it] infringed on the reservation Indians to make their own laws and be ruled by them.” Williams v Lee, 358 U.S.217 (1959). The prosecution against Respondent infringes upon Respondent’s right to run for “elective public office” under the laws of the Crow tribe. “[T]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation’s history.” Rice v Olson, 324 U.S. 786, 789 (1945).

The legal terms contained in the Montana Constitution are defined in Montana State statutes. The term “elective public office” is not a term of universal legal or extrajudicial application in Montana state law; rather, it has a limited definition and application. The term “election,” as defined by MCA – Elections 13-1-101, “means a general, regular, special, or primary election held pursuant to the requirements of state law.” Tribal elections are not included in this definition, as they are not “held pursuant to the requirements of state law.” “Public office,” as defined by the MCA – Elections 13-1-101, “means a state, county, municipal, school, or other district office that is filled by the people at an election.” This definition does not include Crow Tribal elective offices. The limited definitions of “election” and “public office” in MCA reflect the lack of jurisdiction of the State over Indian

tribes. Article VII Section 10 is therefore not applicable to a Crow Tribal member, running for elective tribal office under the Crow Constitution.

“Elective public office” is therefore erroneously defined and applied by the Prosecutor. The use of the same term by both sovereigns doesn’t mean that that term is identical in its definition, application and enforcement. The fact that the Crow Constitution uses an identical term does not give the State authority to enforce State laws upon Indian tribes claiming that that term is universal and uniform in its definition and thereby available to the state to adopt and use for its own legal and political purposes. Such an adoption and use by the Prosecutor is illegal and prohibited.

## B. STATE CONSTITUTIONAL AND STATUTORY VIOLATIONS

Respondent contends that he is in a unique position, and that this is a case of first impression. To apply the Montana Constitution, and the Montana Code of Judicial Conduct to him:

1. Violates the United States Constitution (Commerce Clause, Art. 1, sec. 8, cl.3); see McCullough v Maryland, 17 U.S. (4 Wheat.) 316 (1819). In Worcester v Georgia, 6 Pet. 515, 559 (1832), Chief Justice Marshall observed that Indian tribes had “always been considered as distinct, independent political communities, retaining their original natural rights.” (Emphasis added.)
2. Violates the Crow Constitution (sovereign nation). State sovereignty cannot usurp Native American tribal sovereignty. Merrion v Jicarilla Apache Tribe, 455 U.S. 130 (1982). Indian tribes retain their sovereignty unless divested of it by federal law.
3. Violates the Article I of the Montana Constitution (Montana Compact). The State acquired no legal jurisdiction over Indians, tribes or reservations by way of admission to statehood.
4. Violates the enumerated powers clause of the United States Constitution and the 10<sup>th</sup> Amendment. The State has only those enumerated powers granted the state by the federal

government, and the State Constitution. Prosecution of Respondent is an illegal attempt to exert extrajudicial jurisdiction.

5. Violates the federal government's preemptive right to govern Indians and tribes (U.S. Supremacy Clause). A separate body of Indian preemption law has grown from special policies set out in Worcester v Georgia, 6 Pet. 515, 557 (1832). This is traced to the Commerce Clause cases. Gibbons v Ogden, 22 U.S. (9 Wheat. ) 1 (1824).
6. Violates the Fort Laramie Treaty of 1868. The Crow Tribe is a domestic dependent nation. Johnson v McIntosh, 21 U.S. 543 (1823).
7. Abuses state authority and constitutes a violation of the Statutes of the State of Montana. Applying Section 13-1-101(28), MCA to Indians running for Tribal public elective office is illegal and violates the Montana Compact.
8. Violates judicial precedent. Congress has plenary powers over Indian tribes to the complete exclusion of state laws. Johnson v McIntosh, 21 U.S. 543 (1823). Lone Wolf v Hitchcock, 187 U.S. 553, 23 S.Ct. 216, 47 Led. 299 (1903); McClanahan v Arizona Tax Commission, 141 U.S. 164 (1893).
9. Constitutes an unauthorized extrajudicial enforcement of State laws. Cherokee Nation v Georgia, 30 U.S. 1, 8 L. Ed. 25 (1831). Indian tribes "denominated domestic dependent nations..." with the relationship to the United States resembling "that of a ward to his guardian..." Worcester V Georgia, 31 U.S. 515, 8 L. Ed. 483 (1832). "The Cherokee nation, then, is a distinct community, occupying its own territory, within boundaries accurately described, in which the laws of Georgia have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress." The acts of the State of Georgia

“interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the union...”

Had Respondent filed an application to run for an “elective public office” in the State of Montana’s political system, such as Secretary of State, or State Representative, this prosecution would be no contest. However, Respondent ran for an “elective public office” in the Crow Tribal political system under the laws of the Crow Tribe.

Respondent ran for an “elective public office” that was only available to qualified Tribal members and not available to non-tribal members who are citizens of the State of Montana. The Prosecutor’s illegal and unauthorized application of State laws and Rules under the circumstances, is prohibited and without precedent. To stretch the term “elective public office” as used in the Montana Constitution and Montana Statutes to apply to a Tribal member acting under his tribe’s sovereign rights, would be similar to a claim that the State of Montana’s Constitution, and election statutes are enforceable in the State of Colorado.

The extraterritorial jurisdiction which the Prosecutor has attached to “elective public office” raises legal issues involving the sovereign laws of the United States of America and Crow Tribe. To cite endless cases that support a finding of violations by non-Indian candidates running for elective public office (offices recognized by that state’s constitution) is completely irrelevant to the facts of this case. Respondent is a citizen of the Crow Tribe, a “domestic dependent nation.” One could argue that he has dual citizenship. The State of Montana has no legal right to interfere with respondent exercising his legal rights as a Crow citizen.

The Prosecutors contention that “Respondent was and is always free to run for a non-judicial public office so long as he forfeits his judicial position per Montana Constitution” is disingenuous and based upon incorrect legal thinking and an erroneous position in this case that:

1. The Montana Constitution is superior to the U.S. Constitution, its treaties and statutes regarding Indians. This is clearly not so.
2. That the Montana Constitution can be enforced upon Respondent acting under the laws of a recognized separate political sovereign, the Crow Tribe.
3. That Respondent, under the laws of this state, can be penalized, punished, forced to choose between holding his judicial appointment or forfeiting his legal and constitutional rights under the U.S. and Crow Constitution.
4. That Respondent must submit to the laws of this State, in a situation where the laws of this State don’t apply to him, thus violating his right to equal protection of the laws.
5. That Respondent’s running for tribal office constitutes a political elective activity under the laws of this state.
6. That Respondent must consider his running for tribal chairman to be equivalent to running for governor of this state.
7. That Section 13-1-101(28), MCA applies to Respondent when the very terms of that statute state that “elective public office” refers to public office under the laws of this state.
8. That Section 13-1-101(28), MCA has extrajudicial application. If this Commission does not accept this statute for the definition on its face, and acknowledge that respondent did not run for an “elective public office” under the laws of the State of Montana, this Commission is operating without legal authority, outside the law.

That the cases cited by the Prosecutor apply to Indians and Tribes. The cases cited by the Prosecutor in his brief do not apply to this case or Respondent. There are no state or federal case decisions to guide the Commission in this case. Therefore, the Commission must be guided by the U.S. Constitution, the Commerce Clause, the 10<sup>th</sup> Amendment, the Crow Treaty, Congress' plenary powers over Indians, the Montana Compact, federal preemption, the laws of different sovereignties involved, the strong case authority supporting Respondent's contentions, and Respondents rights as citizen of the Crow Tribe.

#### C. RESPONDENT'S ALLEGED ETHICAL VIOLATIONS ARE ILLUSORY

Since Article VII Section 10 of the Montana Constitution does not apply to Respondent, he has therefore not violated the Montana Code of Judicial Conduct. Respondent has been charged with a violation of this Code based upon the Prosecutor's erroneous and illegal contention that he has violated Article VII Section 10. This is a boot strap argument. No Article VII Section 10 violation exists for all the legal reasons set forth above, therefore no Code violation exists. It is undisputed and undeniable that no facts exist to support any claim that Respondent has ever acted in any manner suggesting that he:

1. Failed to promote public confidence;
2. Lacked integrity;
3. Acted other than impartially;
4. Failed to act independently, or in other that in a fair and equitable, and objective manner;  
or
5. Acted with impropriety.

The inclusion of the claim that Respondent violated the Montana Code of Judicial Conduct is based upon speculation, hypothecation, and conjecture. It is a fabricated charge.


### III.CONCLUSION

The decision of this Commission should not be made with tunnel vision. The U.S. Constitution, federal legal precedence, and the Montana Compact and Indian law controls the charges against Respondent in the Formal Complaint. The weight of authority strongly and clearly supports the Motion to Dismiss and the Commission's finding in favor of Respondent.

Dated January 25, 2010

Respectfully Submitted.

Eggers Law Firm


By:   
William J. Eggers III  
Attorney for Leroy Not Afraid



**CERTIFICATE OF SERVICE**

I hereby certify that on this 25<sup>th</sup> day of January, 2010, a copy of Respondent's Supplemental Memorandum in Support of Motion, and this Certificate of Service was served by U.S. Mail (first class postage) on the following person:

Geoffrey R. Keller  
Matovich, Keller & Murphy, PC  
PO Box 1098  
Billings, Montana 59103-1098

By:   
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